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Buffalo, NY 14202

EXAMINER

DEGUIRE, KATHERINE E

ART UNIT	PAPER NUMBER
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1794

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11/13/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/589,169	Applicant(s) JOSEF ET AL.	
	Examiner KATHERINE DEGUIRE	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>2008/12/24, 2008/01/21, 2007/03/26, 2006/08/11</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 2,9,15, and 17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claim 2, the phrase "legumes and/or fruits and/or fibers" is unclear because one of ordinary skill in the would not know the metes and bounds of the claim.

The claim may be interpreted in a number of ways, including the following:

- i) legumes or fruit and fibers
- ii) legumes and fruit or fibers
- iii) legumes or fruit or fibers
- iv) legumes and fruit and fibers

The scope of the claim is unclear due to the wide range of claim interpretations.

Dependent claim 15 is unclear due to confusion over the order of method steps.

Claim 13, the independent claim of 15, cites the method:

- a) softening the gluten mass
- b) mixing the softened gluten with a preferred vegetable until essentially

homogenous mass is obtained

Since the softening step occurs before the vegetables are added, one of ordinary skill in the art would expect that the gluten is pre-softened by a material other than the vegetables added in step b. However, claim 15 states that "the gluten is softened using naturally occurring agents found in the vegetables." The vegetable addition step occurs after the softening step so it is contradictory to claim that the softening occurs by the vegetables. Claim 15 may be considered an additional step of softening after the pre-softening in 13a. However, this is unclear based on the claims as they stand.

Claims 9 and 17 contain the language "additional materials selected from the group consisting of...vegetable or other proteins, fats, oils, and water." It is unclear exactly what the claim encompasses due to the wide range of possible interpretations of the language. The claim could read that the additional materials are selected from the group consisting of vegetable proteins, other proteins, fats, oils and water by removing the "or" in the markush claim and assuming that vegetable modifies the word protein. The claim could also read that the additional materials are selected from the group consisting of vegetable, other proteins, fats, oils, and water by taking out the "or" and assuming that vegetable refers to the noun form of vegetable. Another interpretation is that the word "other" individually modifies proteins, fats, oils, and water. For example, other proteins, other fats, other oils, and other water. The word "other" is also unclear because one would now know what the alternative is for the word "other". The word "other" indicates that there is an alternative form of the additional material, for example protein. One would not know what "other protein" encompasses when the alternative protein has not been identified.

Claims 5 and 6 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite in that it fails to point out what is included or excluded by the claim language. This claim is an omnibus type claim.

Claims 5 and 6 contain the language “hereinbefore defined” This language is unclear because it is uncertain exactly what the claim encompasses. “Hereinbefore defined” could include limitations from the specification, prior art, or ordinary skill in the art. One of ordinary skill in the art would not know what “hereinbefore defined” encompasses without further limitation.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-11 are rejected under 35 U.S.C. 102(b) as being anticipated by Zohoungbogbo (US 2002/0098175)

Regarding claims 1 and 2, Zohoungbogbo discloses a vegetable-based dough comprising a)gluten and an added vegetable material (example 1). Zohoungbogbo teaches the use of “vegetable fibres,” and fruits as vegetable materials. The vegetable fibres are prepared from spinach, tomato, inulin and acacia (paragraph 17).

The specification of the instant application states that vegetables such as tomato can be used as natural softening agents (p.7). Since Zohoungbogbo discloses tomato as a possible vegetable material, the gluten in the final vegetable dough product of claim 1 would inherently be softened when mixed with tomato.

Regarding claim 3 and 4, the composition of claim 1 would inherently be considered a product consisting of softened gluten in admixture with vegetable materials. The gluten material is inherently softened from the tomato and considered in admixture with the vegetable material since the vegetable material and gluten are homogeneously mixed when preparing the product (paragraph 99).

The language of claim 4 is as follows: "Vegetable dough according to claim 1, consisting of an essentially homogeneous mixture of softened gluten to which vegetable material has been added." Claim 4 is a product claim that contains language regarding the method of making the product. The only aspects of claim 4 that are considered limitations are ones that involve actual properties of the product itself. In other words, the process of mixing softened gluten with vegetable protein is not limiting for the product claim for prior art purposes. The vegetable dough still has the same properties whether the gluten is softened first or upon addition of vegetable material. The only limitations for claim 4 are as follows: an essentially homogeneous mixture of softened gluten with vegetable material. As stated above, Zohoungbogbo discloses a homogeneous mixture of softened gluten and vegetable material.

Regarding claim 5 and 6, Zohoungbogbo discloses a plant fiber(vegetable material) concentration of 35 to 50% of the vegetable dough (paragraph 11).

Regarding claim 7, Zohoungbogbo discloses a vegetable dough that is considered mouldable (paragraph 99). A mouldable dough composition would inherently have elastic properties in order for it to assume the desired shape. Dough would also inherently be elastic due to the nature of gluten when mixed with water.

Since Zohoungbogbo discloses the exact composition of claim 1, one of ordinary skill in the art would expect the composition to have the claimed property of elasticity absent any clear and convincing evidence to the contrary.

Regarding claim 8, Zohoungbogbo discloses wheat gluten as the gluten material (example 1).

Regarding claim 9, Zohoungbogbo discloses added vitamins (column 44), flavor enhancers, and coloring agents (paragraph 80). A bread product would inherently contain yeast.

Regarding claim 10, Zohoungbogbo teaches that the vegetable dough composition of claim 1, comprising softened gluten and an added vegetable material, can be baked to create a vegetable-based bakery item such as bread (paragraph 101)

Regarding claim 11, Zohoungbogbo discloses edible materials such as vitamins that are added to the dough prior to baking (paragraph 80).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Zohoungbogbo.

Regarding claim 12, Zohoungbogbo does not specifically disclose additional materials in the form of cut or diced vegetables. However, Zohoungbogbo does disclose vegetable materials in the form of vegetable fibres. It would have been obvious to include diced or cut vegetables in the dough product in order to produce a more natural, unprocessed product. Using cut or diced vegetables avoids additional processing steps, such as drying the vegetable material into a powder, which may deplete vegetables of essential nutrients. Diced vegetables also give the vegetable dough a different texture than dough with vegetable powder. Diced vegetables allow for the consumer to experience the natural flavor of the vegetables which might be lost when using processed or dried materials.

Claims 13-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Zohoungbogbo in view of Schmer (US 4,938,976)

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Regarding claim 13 and 14, Zohoungbogbo teaches mixing gluten with a preferred vegetable until the mass is homogenous. Zohoungbogbo does not teach first softening the gluten before adding the vegetable material, specifically with a reducing agent.

However, Shemer teaches the use of the reducing agent ascorbic acid to form softened gluten (column 4, line 14-24). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Zohoungbogbo with Shemer by including a reducing agent in order to soften the gluten before preparing the vegetable dough. One of ordinary skill in the art would have been motivated to do this because the instant application specifically states that reducing agents are commonly used as relaxants for gluten products (p. 6). Furthermore, the instant application specifically discloses Shemer as a possible source of a reducing agent for the present invention. A reducing agent relaxes the gluten so that it can be easily molded into a desired shape for the final baked product. It also allows for the gluten to easily mix with the vegetable material when preparing the vegetable dough. Shemer also discloses that ascorbic acid produces a more favorable taste than with commonly used sulfiting agents (column 4, line 14-24).

Regarding claim 15, the specification of the instant application states that vegetables such as tomato can be used as natural softening agents. Since Zohoungbogbo discloses tomato as a possible vegetable material, the gluten in the final vegetable dough product of claim 1 would inherently be softened when combined with tomato.

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Regarding claim 16, Zohoungbogbo discloses wheat gluten as the gluten material (example 1).

Regarding claim 17, Zohoungbogbo discloses added vitamins, flavor enhancers, and coloring agents. A bread product would inherently contain yeast.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to KATHERINE DEGUIRE whose telephone number is (571)270-1136. The examiner can normally be reached on Monday through Friday 9-5:30 EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ Katherine E DeGuire/
Examiner, Art Unit 1794

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1794